No. 94-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF ON THE MERITS OF PETITIONERS GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE

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QUESTION PRESENTED

Whether an attorney engaged solely to prosecute litigation against a consumer is a "debt collector" within the meaning of the Fair Debt Collection Practices Act (15 U.S.C. § 1692a(6)).

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OPINIONS

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 25 F.3d 536, and is reproduced in the Joint Appendix filed herewith ("J.A.") at page 32. The order of the United States District Court for the Northern District of Illinois was not published. It is reproduced at J.A. 26.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1994. J.A. 32. Petitioners filed their petition for writ of certiorari on August 25, 1994. On October 31, 1994, this Court granted the petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Fair Debt Collection Practices Act § 1692a(6): 15 U.S.C. § 1692a(6). Definitions

> (6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (f) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include. . .

* * *

Fair Debt Collection Practices Act § 1692e(2): 15 U.S.C. § 1692e(2). False or misleading representations:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of the section:

> (2) The false representation of—
>
> (A) The character, amount, or legal status of any debt; or
>
> (B) Any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

* * *

Fair Debt Collection Practices Act § 1692f: 15 U.S.C. § 1692f. Unfair practices

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of the section:
>
> (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

STATEMENT OF THE CASE

Gainer Bank of Gary, Indiana lent money to Jenkins for the purchase of an automobile. J.A. 7. Pursuant to the installment contract, Jenkins agreed to maintain insurance on the car until she made the last payment. If Jenkins did not keep insurance, the bank was allowed to purchase insurance for the car. The contract provided that premiums incurred by the bank for such insurance could be added to the contract balance payable by Jenkins. J.A. 7.

Jenkins stopped buying insurance for the car and making payments on the car loan. The bank purchased insurance for the car. J.A. 12. The bank then hired George W. Heintz and Bowman, Heintz, Boscia & McPhee ("Heintz") to file a lawsuit to recover the remaining installment payments and the cost of the insurance. J.A. 7-8.

Heintz filed a lawsuit on behalf of the bank against Jenkins. J.A. 8. Jenkins retained her own attorney. J.A. 12. On July 9, 1992, Heintz sent the following letter to Jenkins' attorney (J.A. 12):

> Attorney Steven Morton
> Suite 563, 221 N. LaSalle Street
> Chicago, IL 60601
>
> Re: Gainer Bank vs. Darlene Jenkins
> 89 M1-147179
>
> Dear Mr. Morton:
>
> This is a letter to follow up our recent telephone conversation in an attempt to amicably resolve this matter. I am enclosing the following documents and advising as follows:
>
> 1. Copy of the retail installment contract whereon I have highlighted on the reverse side revisions eight and twelve regarding having Darlene Jenkins keep the vehicle fully insured at all times and allowing the creditor, if the vehicle is not insured, to purchase such insurance, add the price to the contract balance and shall be payable at the then annual percentage rate in effect.
> 2. This contractual default and failure to keep the vehicle properly insured happen . . . four occasions [sic]. For your reference, I enclose herewith insurance information showing the Bank purchased insurance for periods of time—November 19, 1987 through April 11, 1991 and paid therefore the amount of $4173.00. This amount plus the accruing contractual interest was added to the contract balance. After the vehicle was repossessed and ultimately sold, the last policy so purchased was canceled [sic] and there was a return premium of $347.00 which was properly applied to the account.

> 3. I believe the parties have jointly focused on the fact that approximately 35 out of 48 payments on the contract were made although sporadic and delinquent. It would therefore indicate that approximately payments of $236.71 were due or an additional approximate $3,000 was due. $3,000.00 added to the $4,173.00 for insurance along with the late charges on the contract along with the interest which was accruing on all the monies advanced for insurance approximately $8,500.00 balance in effect at the time of repossession.
>
> This matter is next up for status on July 15, 1992, and hopefully we can discuss it prior to or at the status conference to reach some type of amicable practical resolution. If you have any questions or need additional information, please be in contact with me.
>
> /s/ George W. Heintz

Jenkins alleged that the bank did not buy only damage and loss insurance for the car, but also purchased a "financial protection" policy to insure against the possibility that she might default on the loan. J.A. 7. Jenkins alleged that the "financial protection" insurance is an unauthorized charge. J.A. 8-9.

Jenkins filed suit against Heintz. J.A. 6. She alleged that Heintz was a "debt collector" pursuant to the Fair Debt Collection Practices Act. J.A. 7. Jenkins alleged that the letter to her attorney violated the Act in two respects. First, she claimed that because a portion of the insurance charge was not authorized by the installment contract, Heintz violated 15 U.S.C. § 1692f by adding an unauthorized amount to the debt. Second, she alleged that Heintz' attempt to recover an unauthorized insurance charge amounted to a "false representation or deceptive means

to collect any debt" in violation of 15 U.S.C. § 1692e. J.A. 10.

Heintz filed a motion to dismiss the complaint under F.R.C.P. 12(b)(6). J.A. 14. He argued that an attorney engaged solely to prosecute litigation on behalf of a client/creditor was not a "debt collector" within the meaning of the Act. J.A. 17-22. Heintz supported his view with extensive references to the legislative history and administrative interpretations supporting this construction of the Act. J.A. 19-21. The district court granted the motion and dismissed the case with prejudice. J.A. 25-31.

The court of appeals reversed. J.A. 32. Relying upon the allegations in Jenkins' complaint that Heintz "regularly engaged for profit in the collection of debts," the court found that Heintz was a debt collector within the meaning of 15 U.S.C. § 1692a(6). J.A. 35-36. The court rejected the argument that Congress did not intend the Act to apply to attorneys engaged solely in the prosecution of litigation, finding that the broad statutory language "entered all areas inhabited by debt collectors, even litigation." J.A. 37. The court declined to address the legislative history and administrative interpretation of the Act, stating "our analysis ends with the [statutory] language." J.A. 37.

SUMMARY OF ARGUMENT

The Fair Debt Collection Practices Act was never meant to apply to attorneys engaged solely to prosecute litigation on behalf of a creditor.

In its original version, the Act exempted attorneys from all provisions. Thus, Congress did not have to consider how the provisions might relate to attorneys engaged in consumer debt litigation. When the attorney exemption

was eliminated, attorneys became liable when they acted as "debt collectors," not as litigation attorneys.

The plain meaning of the term "debt collector" does not extend to attorneys engaged in consumer debt litigation. Thus, the court should refer to legislative history and administrative interpretation to divine the statute's meaning. Both the legislative history and administrative interpretation entirely support Heintz' position.

Because Congress only intended the Act's provisions to apply to persons engaged in true debt collection activity, application of the Act to attorneys engaged solely in litigation results in absurd and incongruous results.

ARGUMENT

ATTORNEYS ENGAGED SOLELY TO PROSECUTE CONSUMER DEBT LITIGATION ARE NOT "DEBT COLLECTORS" WITHIN THE MEANING OF THE FAIR DEBT COLLECTION PRACTICES ACT.

Congress enacted the Fair Debt Collection Practices Act ("Act") in 1977 "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrained from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). The Act identified common abusive debt collection practices, such as late-night telephone calls, (15 U.S.C. § 1692c(a)(1)), embarrassing communications through third parties, (15 U.S.C. § 1692c(b)), harassment, (15 U.S.C. § 1692d), and false and misleading representations by debt collectors (15 U.S.C. § 1692e).

As originally drafted, the Act specifically exempted attorneys from liability within the definition of "debt collec-

tor." 15 U.S.C. § 1692a(6)(f) (1977). The attorney exemption, however, allowed attorneys to perform all functions of a debt collector without the risk of violating the Act. In 1986, Congress amended the Act to delete the attorney exemption. This amendment closed the loophole that allowed attorneys engaged in the targeted, unsavory debt collection activities to avoid the protection of the Act merely because they had obtained a law degree. H.R. Rep. No. 405, reprinted in *U.S. Code, Cong. & Admin. News* at 1754.

The issue in this case arises because the 1986 amendment created a question not addressed by the Act: does an attorney like Heintz, who is engaged solely to prosecute consumer debt litigation, act as a "debt collector" when performing traditional litigation functions?

A. The Plain Language of the Definition of "Debt Collector" Does Not Include Attorneys Engaged in the Prosecution of Consumer Debt Litigation.

Whether the Act applies to attorneys involved in litigation activities turns on the definition of "debt collector." The starting point in this statutory construction is the plain language of the Act. *United States v. Hohri*, 482 U.S. 64, 69 (1987). The court need inquire no further when the statutory language is plain, and if nothing in the Act's structure and relationship to other statutes calls its meaning into question. *Amoco Production Company v. Village of Gambell, Alaska*, 480 U.S. 531, 552-553 (1987).

The Act defines "debt collector" as:

> Any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . 15 U.S.C. § 1692a(6).

The court of appeals found this language clearly applicable to attorneys involved in litigation. However, there is nothing in this definition which plainly suggests that an attorney who prosecutes litigation is "collecting" a debt. Nor does the definition address the types of things attorneys do when litigating disputed consumer debts.

The Act reflexively defines "debt collector" as someone who regularly engages in the collection of debts. This definition begs the question posed by this case: what is the "collection of a debt?" Like many ambiguous terms, there is a core of persons or objects to which the term clearly applies. Collection agencies, credit bureaus and the like who are hired by creditors to contact debtors in an effort to obtain payment of their debts plainly are engaged in the collection of debts within the meaning of the Act.

But the activities of an attorney, whose only contact may be through pleadings or correspondence with the debtor's counsel, do not neatly fit within the common, everyday use of the phrase "collection of a debt." Nor do actions such as filing pleadings or writing "rational and calm" letters to opposing counsel (J.A. 30) fall plainly within the scope of a statute whose purpose is to eliminate certain specific, obnoxious practices.

Litigation by an attorney against his client's adversary is not the "collection of debts" through use of interstate commerce or the mail. By filing a lawsuit, the attorney opts to use the judicial system as the appropriate means of enforcing the client's rights. It is only by judgment or settlement of the suit that the litigation can be resolved, rather than by the coarser methods of debt collection prohibited by the Act.

If the court of appeals' decision is allowed to stand, Congress has greatly expanded the scope of the Act's reach

by bringing a greater spectrum of attorney activity into the conceivable scope of the phrase "debt collector" than originally intended. Heintz submits that this was entirely inadvertent, based upon the legislative history and a review of the Act as a whole.

Two of the circuit courts which issued opinions similar to the court of appeals' decision in this case chide Heintz' argument as a "phantom limb" theory of statutory interpretation. *Fox v. Citicorp Credit Services*, 15 F.3d 1507, 1512 (9th Cir. 1994); *Paulemon v. Tobin*, 30 F.3d 307, 310 (2d Cir. 1994). These courts view the attorneys' arguments as attempting to cling to an exemption from liability that was eliminated by the 1986 amendment.

This is simply a distortion of the arguments raised by collection litigators. Heintz and the defendants in *Fox* and *Paulemon* do not ask for a blanket immunity from liability. They recognize that they are subject to liability when they act as true debt collectors, assuming that they "regularly" engage in the business of collecting consumer debts.

The flaw in the *Fox* and *Paulemon* "phantom limb" criticism is that these courts refuse to recognize the ambiguity in the phrase "collection of debt". There is a world of difference between the act of contacting debtors to persuade them to pay their debts, and the drafting, filing, serving, and prosecuting a complaint, obtaining a judgment, and executing upon the judgment. This significant difference calls into question the breadth of the phrase "collection of a debt", especially since Congress did not have to consider how it related to attorneys when the Act was first passed.

A point which arises from Jenkins' complaint, and which was discussed in footnote no. 5 in *Fox* (15 F.3d at 1513), stems from the allegation that Heintz "regularly attempts

to collect debts due another" (J.A. 7), thereby making him a "debt collector." Heintz does not deny that for *some* clients, on *some* occasions, he does act as a debt collector. But the allegations in this case relate solely to the letter Heintz wrote to Jenkins' attorney. This letter, by its terms, relates to a matter already in litigation. In short, the fact that Heintz does act as a debt collector in some instances does not subject him to liability under the Act when his engagement, and the actions taken pursuant to that engagement, do not involve the debt collection activity addressed throughout the Act.

Finally, a number of courts have analyzed this definition, and found it subject to interpretation, such as the district court in this case (J.A. 26). See also *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993); *Green v. Hocking*, 792 F.Supp. 1064 (E.D. Mich. 1992); *Fireman's Insurance Co. of Newark, N.J. v. Keating*, 753 F.Supp. 1137 (S.D.N.Y. 1990); *National Union Fire Ins. Co. v. Hartel*, 741 F.Supp. 1139 (S.D.N.Y. 1990); *Concord Assets Finance Corp. v. Radebaugh*, 568 N.Y.S.2d 950 (1991); *See also Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480, 1484 (S.D. Ala. 1987) (the court utilized the legislative history in interpreting "debt collector" and stated that the statute was far from a model of drafting clarity).

The definition of "debt collector" is ambiguous, as applied to attorneys engaged solely to prosecute consumer debt litigation. Therefore, this Court should consider legislative history and other ancillary sources of interpretation. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). These sources unequivocally demonstrate that Heintz did not act as a debt collector in this case.

B. The Legislative History, Administrative Interpretation and Structure of the Act as a Whole Support Heintz' Argument That He Did Not Act as a Debt Collector in This Case.

To determine intent, this Court seeks guidance from the statutory structure, the relevant legislative history, the congressional purpose expressed in the Act, and the interpretation placed on it by the federal administrative agency charged with its enforcement. *United States v. Hohri*, 482 U.S. 64, 70 (1987); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985). Using all of these tools of statutory interpretation, it is clear that Congress did not intend the Act to apply to an attorney whose sole function was to reduce a claim over a delinquent debt to judgment.

On November 26, 1985, the House Committee of Banking, Finance and Urban Affairs reported on the proposed amendment to the Act which would repeal the attorney exemption. H.R. Rep. No. 405, reprinted in 1986 *U.S. Code Cong. & Admin. News* at 1752. In that report, the Committee detailed how, since the passage of the Act, attorneys had entered the debt collection industry so that the number of attorney debt collectors exceeded the number of lay debt collectors. *Id.* The Committee went on to note several abusive practices prohibited by the Act which attorneys, but not lay debt collectors, could engage in because of their exemption. These included:

> Late night telephone calls to consumers, calls to consumers' employers concerning the consumers' debts, frequent and repeated calls to consumers, disclosure of consumers' debt to third parties, threats of legal action on small debts where there is little likelihood that legal action will be taken, simulation of legal process, harassment, abuse, threats of seizure, and attachment and sale of property where there is little likelihood that such action will be taken. *Id.* at 1755.

The report noted that many law firms which engage in debt collection employed lay persons as "account representatives" and employed procedures typically employed by ordinary debt collection firms. *Id.* at 1754. The Committee recommended doing away with the attorney exemption because "consumers should not be stripped of an important protection solely because the collector happens to have a law degree." *Id.*

The Committee's report makes it clear that the attorney exemption was repealed to prevent attorneys from engaging in the same abusive conduct as ordinary debt collectors merely because they were licensed to practice law. However, the abusive conduct discussed by the Committee had nothing to do with actions taken as part of litigating delinquent debt cases, and the report reveals no congressional intent to regulate the filing and prosecution of lawsuits to reduce debts to judgment. Furthermore, while *some* abusive types of debt collection correspondence are addressed by the Act, the legislative history says nothing about correspondence between opposing counsel in a pending case.

That Congress did not intend to cover litigation activity is further evidenced by the remarks of Representative Frank Annunzio, who sponsored the legislation repealing the attorney exemption. Representative Annunzio addressed the House of Representatives three months subsequent to the passage of the amendment deleting the attorney exemption. Representative Annunzio stated:

> Ethical attorneys need have no concerns about the impact of the Act on their practices. The [Act] regulates debt collection, *not the practice of law. Congress repealed the attorney exemption to the Act not because of attorneys' conduct in the courtroom, but because of their conduct in the back room. Only collection activities, not legal activities are covered by the*

> *Act.* The Act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature. . . . The Act only regulates the conduct of debt collectors, it does not prevent creditors through their attorneys, from pursuing any legal remedies available to them (emphasis added). 132 Cong. Rec. page 10,031 (1986).

Representative Annunzio further stated that "repeal of the exemption does not infringe upon the practice of law by attorneys. It does assure that consumers are protected from unfair and unethical practices, regardless of the profession of the collector." *Id.*

C. The Act as a Whole Reveals That Congress Could Not Have Intended to Apply It to Attorneys Engaged Solely in the Prosecution of Consumer Debt Litigation.

In interpreting statutory language, this Court will also review other provisions of the statute to determine whether the proposed interpretation will be consistent with other portions of the Act. See *United States v. Hohri*, 482 U.S. 64, 67 (1987); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 488 (1985). It is a "fundamental proposition of statutory construction" that the meaning of a word shall be drawn from its context. *Deal v. U.S.*, 508 U.S. ____, 124 L.Ed.2d 44, 50 (1993).

Application of the term "debt collector" to attorneys involved in the litigation context is inconsistent with other provisions of the Act. Representative Annunzio recognized this when discussing the Act after passage of the 1986 amendment. He stated that because an attorney who actually brings a lawsuit to collect a debt "will be required to prove the validity of the debt as an element of the legal proceedings," the verification of a debt by the collector requirements (15 U.S.C. § 1692g(a)(4)) are not applicable "in the context of legal proceedings." 132 Cong. Rec. H10,031.

Other provisions of the Act are downright awkward if attorneys engaged in consumer debt litigation are considered "debt collectors." The Act provides that the debt collector, when acquiring location information about a consumer represented by an attorney, can only communicate with the attorney, "unless the attorney fails to respond within a reasonable period of time to communication from the debt collector." 15 U.S.C. § 1692b(6). The rules of professional conduct forbid an attorney from communicating with an opponent represented by counsel regardless of the responsiveness of that attorney. See ABA Model Rules of Prof. Cond., DR. 7-104(A)(1). If a litigating attorney is a "debt collector," the Act apparently countenances violating prevailing ethical standards.

The Act also provides that the debt collector may not communicate with the debtor if told not to, except to inform the debtor that further action may be taken. 15 U.S.C. § 1692c. This section makes no sense with regard to a litigation proceeding. Applied literally, an attorney suing a *pro se* debtor could not send him notice of court appearances, depositions or make settlement proposals. Nothing in the Act suggests that Congress meant to subvert the ordinary litigation processes.

Furthermore, the Act provides that within thirty days of the first notice, the consumer can inform the debt collector that the debt is disputed or that he requests the name and address of the original creditor. 15 U.S.C. § 1692g(b). If the debtor makes this written request, the debt collector must cease collection activity until complying with the request. Again, if an attorney pursuing litigation is a "debt collector", this provision allows the debtor to stop

the litigation process within the first thirty days. It would be an unusual statute which allows a defendant to cease proceedings unilaterally. Under the Federal Rules of Civil Procedure, for example, a defendant must respond to the complaint within twenty days of receiving summons. This also would conflict with F.R.C.P. 26, which mandates disclosure of documents and other information immediately after the commencement of litigation. Section 1692g(b) would appear to allow a debtor to disregard the rules of civil procedure if litigation is the "collection of a debt."

The only reference to litigation in the Act is not even directed to a deceptive or unfair practice in the actual prosecution of litigation. Section 1692i forbids a debt collector from bringing an action in a county other than the debtor's residence. 15 U.S.C. § 1692i. This section addresses an unfair *collection* technique, not a litigation practice. The choice of an inconvenient forum has nothing to do with litigation of the merits of the debt itself. Instead, Congress was attacking the unfair collection practice of making the debtor hire counsel and defend the suit in a distant forum, but this has nothing to do with the creditor's attorney's actual prosecution of the case.

In fact, Section 1692i(b) give rise to the ultimate irony in this case. If one inserts the word "attorney" for the word "debt collector," it would read, "nothing in this section shall be construed to authorizing the bringing of legal actions by [attorneys]." 15 U.S.C. § 1692i(b). This is not mere wordplay. Rather, it is proof that the original terms of the statute were meant to address non-attorney activity. However, when attorney debt collection activity became covered, that coverage could not extend to the ordinary litigation activities of an attorney, without producing absurd results.

Furthermore, Congress empowered the Federal Trade Commission to ensure compliance with the Act. If an attorney is considered a debt collector in the litigation context, the Act extends to the FTC authority to oversee attorney litigation practices. 15 U.S.C. § 1692l. Regulation of an attorney's conduct is traditionally the province of the courts, not the federal executive branch. Absent some compelling evidence to the contrary, Congress should not be presumed to have empowered the F.T.C. to assume this traditional judicial function.

Finally, attaching liability to an attorney's conduct as an advocate in the adversarial context runs directly counter to traditional common law immunities. Heintz' letter, in a more extreme circumstance, could be considered defamatory. However, nearly all jurisdictions hold that there is an absolute privilege for an attorney to publish defamatory matter related to litigation. This view is stated in the Restatement (Second) of Torts, which provides:

> "An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceedings." Restatement (Second) of Torts § 586 (1965).

The attorneys' absolute privilege, as stated in the Restatement (Second) of Torts § 586, and the attorney's derivative privilege to advise his client also immunizes an attorney from liability in suits for malicious interference with business (*McLaughlin v. Copeland*, 455 F. Supp. 749 (D. Del. 1978)), civil conspiracy to libel; (*Lerette v. Dean Witter Org. Inc.*, 60 Cal. App. 3d 573, 131 Cal. Rptr. 592 (1976)), intentional infliction of emotional harm; (*Janklow v. Keller*, 90 S.D. 322 (S.D. 1976)), deceit; (*Twyford v.*

Twyford, 63 Cal. App. 3d 916, 134 Cal. Rptr. 145 (1976)), abuse of process; (*Thorton v. Rhoden*, 245 Cal. App. 2d 80, 53 Cal. Rptr. 706 (1966)), based upon the allegedly defamatory publication.

An interpretation which would expose an attorney to liability for communications in the course of litigation would abrogate a common law immunity. In order to abrogate a common law principle, a statute must speak directly to the question addressed by the common law. *United States v. Texas*, 507 U.S. ____, 123 L. Ed. 2d 245, 252 (1993). The language of the Act scarcely "speaks directly" to the abrogation of traditional attorney immunity for litigation-related communications.

D. The Federal Trade Commission Unequivocally Supports Heintz' Interpretation of The Act.

Representative Annunzio's interpretation of the legislation which he sponsored is echoed by the Federal Trade Commission, the agency charged with administrative enforcement of the Act. 15 U.S.C. § 1692*l*. The FTC interprets and applies the Act in a number of ways, including responding to formal inquiries from the public, issuing formal, binding advisory opinions and issuing non-binding commentaries on its interpretation of the Act. 15 U.S.C. § 1692(a), 15 U.S.C. § 41 et seq.

If a statute is silent or ambiguous with respect to an issue, the courts should defer to a reasonable construction of the statute made by the enforcing agency. *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 843-44 (1984).

The FTC's position was stated in its 1988 Staff Commentary on the Act: "an attorney or law firm whose efforts to collect consumer debts on behalf of its clients regularly include activities traditionally associated with debt collection, such as sending demand letters (dunning notices) or making collection calls to consumer," is included in the Act's definition of "debt collector." *Statement of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act*, 53 Fed. Reg. 50,097, 50,102 (1988). Conversely, "an attorney whose practice is limited to legal activities, (e.g., the filing and prosecution of lawsuits to reduce debts to judgment)" does not fall within the definition. *Id. See also* Noonan, *Federal Trade Commission Activity: Pursuing Unfair and Deceptive Practices In Consumer Financial Service*, 43 Bus. Law. 1069, 1075 (1988) (the FTC's interpretation of the Act is that attorneys must be engaged in collection activity, apart from collection litigation, to come within the definition of a debt collector); *Dugan*, FTC activities, 44 Bus. Law. 1419, 1424 (1989).

The FTC remains consistent in its interpretation of the Act. On April 12, 1994 the Commission issued its 16th annual report to Congress on the Fair Debt Collection Practices Act. In the report, it stated:

> The Commission believes that FDCPA should be clarified to state explicitly that attorneys who simply file lawsuits are not debt collectors under the Act. For example, depositions would violate § 805(b) [§ 1692(b)]. Pleadings would trigger the § 809 [§ 1692g] and § 807(11) [§ 1692e(11)] disclosure requirements. If the consumer disputed the debt, the attorney/debt collector could be required to drop the suit because § 809(b) requires that collection activity cease until after verification. It is simply not practical to apply the FDCPA to the activities of litigation attorneys because coverage would produce anomalous results. The Commission therefore recommends that the Congress re-examine the definition of "debt collector" and clarify that an

attorney who pursues alleged debtors solely through litigation (or some similar "legal" practices)—as opposed to one who collects debts through the sending of dunning letters or making calls directly to the consumer (or similar "collection")—is not covered by the statute. (CCH, *Consumer Credit* at 84,595 (1994)).

E. F.R.C.P. 11, and Its State Law Counterparts, Already Regulate the Type of Litigation Activity Challenged by Jenkins' Complaint.

More than half the states have adopted, in whole or in part, the Federal Rules of Civil Procedure. Field, Kaplan & Clermont, *Materials for a Basic Course in Civil Procedure*, p. 30 (5th Ed. 1984). This includes Rule 11, which at the time the attorney amendment was deleted from the Act, forbade attorneys from filing lawsuits not "well-grounded in fact" or not "warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law." Attorneys could not file actions "interposed for any improper purpose . . ." Most, if not all states have enacted analogous rules. *See, e.g., La. Stat. Ann*, Art. 863; *Conn. Gen. Stat. Ann.* § 51-84; *Ca. Civ. Pro.* § 1250.330.

These rules are the appropriate method of regulating the type of misconduct claimed by Jenkins. She claims that Heintz filed litigation to collect a debt she did not owe. He pursued this supposedly improper theory through correspondence to her attorney.

If it turns out that Jenkins is right, and that a minimal investigation would have disclosed that Gainer Bank had no right to add the allegedly improper insurance charge, a claim under Rule 11 or its state law counterpart could have been asserted.

There is nothing in the language of the Act which suggests that Congress needed the redundant sanction of an independent cause of action against the attorney to prevent this type of suit from being filed. *Green v. Hocking*, 9 F.3d 18, 21 (6th Cir. 1993). Of course, with the exception of 15 U.S.C. § 1692i, Congress did not mention litigation at all in the Act. Even this section deals with matters entirely unrelated to the merits of the litigation itself.

CONCLUSION

Congress originally intended to protect consumers from the harassment and annoyance associated with dealing with ordinary debt collectors. The repealing of the attorney exemption to prevent attorneys from engaging in the same conduct does not mean that Congress intended conduct not originally covered by the Act to now become covered. Nothing in the Act's legislative history suggests that the purely legal activities involved in the reduction of a debt to judgment were intended to be covered. Legislative history, administrative interpretation, and the structure of the Act as a whole, indicate that such conduct was not intended to be covered. For these reasons, Heintz respectfully requests that this Court reverse the

judgment of the United States Court of Appeals for the Seventh Circuit, and reinstate the judgment of the District Court.

Respectfully submitted,

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